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No. 94-835

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CROWN CORK & SEAL CO., INC.,
Petitioner,
v.
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT

Respondent United Steelworkers of America, AFL-CIO-CLC ("Union") filed this case on behalf of employees laid off from a manufacturing plant operated by Petitioner Crown Cork & Seal Co., Inc. ("Crown"). The layoffs were carried out without the 60-day prior notice required by the Worker Adjustment and Retraining Notification Act (the "WARN Act" or "WARN"), 29 U.S.C. §§ 2101-09.

The Union filed suit just over one year after the initial layoff of employees. The question before this Court concerns the proper limitations period for filing such a WARN ACT suit.

A. Statutory Framework

The WARN Act generally requires that, before initiating a mass layoff or plant closing, an employer must provide 60 days notice to affected employees (or their union representative if they have one), and to officials of the local community in which the layoffs will occur. *See* 29 U.S.C. § 2102(a); 20 C.F.R. § 639.1.[1]

A statutory mass layoff or plant closing occurs when a specified requisite minimum number and/or percentage of employees suffer an "employment loss" within a 30-day period or, in some circumstances, within a 90-day period. 29 U.S.C. §§ 2102(a)(2), (3), and 2102(d). The Act defines an "employment loss" as a layoff lasting more than six months, a termination, or a reduction in work hours of more than 50% for each month of any six-month period. *Id.* § 2101(a)(6).

In specified circumstances, such as where the layoff or plant closing results from unforseeable business circumstances or a natural disaster, or where there is a showing that the employer was seeking capital or business to avoid the closing or layoff, the employer may dispense with, or reduce the period of, the notice that otherwise would be required by the Act. *Id.* § 2102 (b)(1)-(3).

An employer who violates the Act's 60-day notice requirement is liable to aggrieved employees for payments in amounts specified in the Act, which are based upon each employee's daily wage rate, with the aggregate payment not to exceed 60 days of wages, plus benefits and medical expenses. *Id.* § 2104(a)(1). An employer

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[1] The Act defines an "employer" as a business enterprise employing "100 or more employees, excluding part-time employees" or "100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)." *Id.* § 2101 (a)(1)(A) & (B).

violating the Act also is liable to local authorities, who may collect $500 for each day of violation. *Id.* § 2104(a)(3).

Other than the specified monetary amounts, the only relief available in a WARN suit is attorney's fees and costs. *Id.* § 2104(a)(6). The statute states that "[t]he remedies provided for in [§ 2104] shall be the exclusive remedies for any violation of this chapter." *Id.* § 2104(b). WARN does not provide for any injunctive or other equitable relief; on the contrary, the Act expressly prohibits courts from applying the Act to enjoin a plant closing or layoff. *Id.*

WARN Act liability is enforced by filing an action in federal court. Aggrieved employees or their union may file an action, as may a unit of local government. *Id.* § 2104(a)(5).

B. Facts and Proceedings Below

On or about September 30, 1991, Crown ordered a "temporary shutdown" entailing the layoff of approximately 85 Union-represented employees at its Perry, Georgia manufacturing plant. Joint Appendix ("J.A.") 9-10. The layoffs continued for over six months and resulted in an "employment loss' such as to render applicable the WARN requirement of 60 days advance notice. J.A. 10.[2] However, Crown did not provide that notice. *Id.*

On October 15, 1992, the Union filed this action in the United States District Court for the Eastern District of Pennsylvania, where Crown's headquarters is located. J.A. 9. The Union's complaint sought 60 days of wages and benefits for each affected employee. The complaint did not seek any injunctive relief. J.A. 10-11.

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[2] In 1992 the layoffs became permanent when the permanent closing of the plant was announced.

On March 5, 1993, Crown moved for summary judgment. J.A. 15. Crown's motion was based solely on the contention that the Union's claim was time-barred. In support of its defense, Crown contended that WARN Act claims must be filed within the six-month limitations period set forth in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

The District Court denied Crown's motion for summary judgment in a Memorandum and Order dated August 24, 1993. Appendix to Petition for Certiorari ("Pet. App.") 17a-23a. The District Court rejected Crown's contention that NLRA § 10(b) provides the appropriate limitations statute for WARN claims and "conclude[d] that Pennsylvania law provides the appropriate limitations period for civil suits under the WARN Act." Pet. App. 22a. As "[n]either party cite[d] a possible analogous state statute that is shorter than two years," and "plaintiff filed its complaint less than two years [after] defendant's alleged termination of employees at its Perry plant," the court ruled that it did "not have to determine the particular Pennsylvania statute from which to borrow." Pet. App. 22a.

By order dated September 16, 1993, the District Court granted Crown's Motion for Certification for Interlocutory Appeal Pursuant to 28 U.S.C § 1292(b). Pet. App. 24a. The Court of Appeals for the Third Circuit granted Crown permission to appeal. A unanimous panel of that court affirmed the district court's decision. Pet. App. 2a-16a.

This Court granted certiorari, and consolidated the case with No. 94-834, *North Star Steel Co. v. Thomas*.[3]

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[3] We will refer to the petitioner in the present case as "Crown," and to the petitioner in No. 94-834 as "North Star." We will refer to their briefs as "Crown Br." and "North Star Br.," respectively.

SUMMARY OF ARGUMENT

I.

A. For more than 160 years, this Court has followed a practice of adopting state statutes of limitations when a federal statute does not contain an express limitations period. By now, "[t]he practice has enjoyed sufficient longevity that we may assume that, in enacting remedial legislation, Congress ordinarily 'intends by its silence that we borrow state law.'" *Lampf v. Gilbertson*, 501 U.S. 350, 355 (1991) (plurality opinion), quoting *Agency Holding Corp. v. Malley-Duff Assocs.*, 483 U.S. 143, 147 (1987).

The only exception to the rule is "narrow" and "closely circumscribed": a state limitations period will not be borrowed if to do so would *frustrate the policies of the federal enactment.* That this exception is confined to extraordinary situations is manifested in the fact that there is but a single case in which this Court has borrowed for an express federal statutory claim a limitations period contained in a different federal statute.

B. On no acount should the WARN Act become the second member of that set of one. WARN creates a simple damage action against employers who breach a single duty. On its face, this plain-vanilla remedial scheme is the least likely of candidates to require deviation from the usual rule governing selection of limitations periods.

Petitioners fail to show that applying state limitations periods to WARN suits would frustrate federal policy in any way. Although petitioners argue that there is a broad policy favoring the rapid resolution of employment disputes which compels resort to the six month limitations period in § 10(b) of the National Labor Relations Act, this Court has squarely rejected such a theory, holding that § 10(b) is relevant only to claims that "directly challenge both the employer's adherence to [a] collective-bargaining agreement and the union's representation of

the employee in grievance-and-arbitration procedures." *Reed v. United Transportation Union*, 488 U.S. 319, 331 (1989). WARN suits do not involve any such claims.

Nor would the availability of state statutes of limitations for WARN suits present a potential for forum shopping or complexities of litigation beyond what is routinely presented by the countless other federal statutes to which state limitations periods are applied. Indeed, those concerns should arise in WARN litigation to a *lesser* degree than under most such statutes.

C. Failing to establish that state limitations periods would frustrate any federal policy, petitioners argue that NLRA § 10(b) should be adopted as the statute of limitations for WARN suits merely because the NLRA provides a "closer analogy" to WARN than do state causes of action. But this Court's precedents do not permit the state limitations borrowing rule to be pushed aside merely because some federal statute is considered to provide a "closer analogy." And, in any event, the NLRA is not closely analogous to WARN. The NLRA deals with the *process of bargaining*; WARN sets a *minimum substantive standard* and does not mandate or regulate bargaining in any way. WARN and the NLRA thus fall into what this Court has recognized as two discrete categories of labor legislation that are different at the most fundamental level. What is more, the remedies available under WARN bear not the slightest resemblance to the remedies available under the NLRA.

II.

Indeed, WARN is so dissimilar to the NLRA that, if it were proper to borrow a federal statute of limitations for WARN suits, the two-year limitation period for claims under the Fair Labor Standards Act and other federal wage laws would be a more appropriate choice than NLRA § 10(b). Those statutes, like WARN, provide for an action for backpay based on an employee's wage rate. And, a two-year limitation is much more in

the mainstream of federal limitations periods, for labor cases and others, than the unusually short six month limitation of § 10(b), which is designed for special circumstances that simply are not presented by WARN suits.

ARGUMENT

I. THERE IS NO BASIS IN THIS CASE TO DEPART FROM THE LONGSTANDING RULE REQUIRING ADOPTION OF STATE LIMITATION PERIODS FOR EXPRESS FEDERAL STATUTORY CLAIMS AS TO WHICH NO EXPRESS STATUTE OF LIMITATIONS APPLIES

A.

Congress was silent as to the statute of limitations to be applied to claims under the WARN Act. The rule to be followed in this circumstance has long been settled:

> As early as 1830, this Court held that state statutes of limitations govern the timeliness of federal causes of action unless Congress has specifically provided otherwise. *McCluny v. Silliman*, 3 Pet. 270, 277. In 1895, the question was re-examined in another context, but the conclusion remained firm. *Campbell v. Haverhill*, 155 U.S. 610. Since that time, state statutes have repeatedly supplied the periods of limitations for federal causes of action when federal legislation has been silent on the question. [*Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 704 (1966).]

When first announced, the borrowing rule rested on the theory that state statutes of limitations are "the law of the forum and operat[e] upon all who submit themselves to its jurisdiction," including those who sue in federal court on a federally-created right. *McCluny v. Silliman*, 3 Pet. 270, 276-277 (1830). On that understanding, the Rules of Decision Act required that state statutes of limitations be followed by the courts in all such cases.

By the middle of this century, this Court had come to view "[t]he implied absorption of State statutes of limi-

tation within the interstices of the federal enactments" not as an inexorable command of the Rules of Decision Act, but as "a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles." *Holmberg v. Ambrecht*, 327 U.S. 392, 395 (1946).

But this recasting of the doctrinal foundation for the state limitations borrowing rule did not affect the basic rule itself; Justice Frankfurter, speaking for the Court in *Holmberg*, reiterated that "[a]s to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation." 327 U.S. at 395.

This longstanding rule is firmly settled as the background predicate for Congress' legislative actions. *See Agency Holding Corp. v. Malley-Duff Assocs.*, 483 U.S. 143, 147 (1987). As the Court stated in its most recent decision in this area, "[t]he practice [of borrowing state limitations periods] has enjoyed sufficient longevity that we may assume that, in enacting remedial legislation, Congress ordinarily 'intends by its silence that we borrow state law.'" *Lampf v. Gilbertson*, 501 U.S. 350, 355 (1991) (plurality opinion), *quoting Agency Holding Corp.*, 483 U.S. at 147.[4] *See also Agency Holding Corp.*, at 164-165 (Scalia, J., concurring in judgment) ("after a century and a half of the Court's reacting to congressional silence by applying state statutes . . . by now at least it *is* reasonable to say that such a result is what Congress must expect, and hence intend, by its silence"); *Reed v. United*

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[4] *See also Lampf*, 501 U.S. at 368 (Stevens, J., dissenting) (supporting "the traditional rule of applying a state limitations period when the federal statute is silent"); *id.* at 374 (Kennedy, J., dissenting) ("in the absence of an express limitations period in a federal statute, courts as a general matter should apply the most analogous state limitations period, or in rare cases, no limitations period at all").

Transportation Union, 488 U.S. 319, 323-324 (1989); *DelCostello v. Teamsters*, 462 U.S. 151, 158 (1983).[5]

To be sure, the state law borrowing rule is not absolute. Rather, it is subject to what this Court has variously described as a "limited," *Agency Holding Corp.*, 483 U.S. at 147, "closely circumscribed," *Lampf*, 501 U.S. at 356, "unusual," and "narrow exception to the general rule that statutes of limitation are borrowed from state law," *Reed*, 488 U.S. at 324.

In *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977), the Court offered the first full articulation of the nature and extent of that exception. The essential point, said the *Occidental Life* Court, is that "state limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." *Id.* at 367. Most recently, the Court put the point this way: "when the operation of a state limitations period would frustrate the policies embraced by the federal enactment, this Court has looked to federal law for a suitable period." *Lampf*, 501 U.S. at 355-356 (plurality opinion). *See also Reed*, 488 U.S. at 327.

So understood, the exception follows logically from the general rule. While the borrowing rule is so firmly

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[5] Cases in which the Court has applied this rule to hold that claims under a federal statute are subject to state statutes of limitations include, among others, *Reed* (Title I of the Labor-Management Reporting and Disclosure Act); *Hoosier Corp.* (§ 301 of the Labor Management Relations Act); *Owens v. Okure*, 488 U.S. 235 (1989) (42 U.S.C. § 1983); *Wilson v. Garcia*, 471 U.S. 261 (1985) (same); *Goodman v. Lukens Steel*, 482 U.S. 656 (1987) (42 U.S.C. § 1981; employment); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975) (same); *Runyon v. McCrary*, 427 U.S. 160, 180-182 (1976) (§ 1981; admission to private school); *Cope v. Anderson*, 331 U.S. 461 (1947) (National Bank Act); *O'Sullivan v. Felix*, 233 U.S. 318 (1914) (Civil Rights Act of 1871); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390 (1906) (Sherman Act); *Brady v. Daly*, 175 U.S. 148, 158 (1899) (copyright infringement); *Campbell v. Haverhill*, 155 U.S. 610, 614-617 (1895) (Patent Act).

established that "we can generally assume that Congress intends by its silence that we borrow state law," *Agency Holding Corp.*, 483 U.S. at 147, that assumption makes no sense if the otherwise applicable state law rule would frustrate federal policies. Rather, in that circumstance it is "inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." *Id., quoting DelCostello*, 462 U.S. at 161.

The Court's cases applying this "narrow exception" illustrate its "circumscribed" limits. Only rarely has the Court borrowed a federal limitations period and applied it to a statutory cause of action which lacked its own statute of limitations; in each case the legal context was most assuredly "unusual." *Reed*, 408 U.S. at 324.

In *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958), the Court applied a federal statute of limitations to a *federal common law* cause of action which necessarily was joined with a federal statutory claim containing an express statute of limitations. Because the cause of action at issue in *McAllister* arose under the federal common law, there was no basis for assuming a congressional intent to follow the usual rule of state borrowing. Moreover, because that common law claim was necessarily joined with a statutory claim, the application of a shorter state limitation to the federal common law claim would "effect in substance a similar limitation" on the statutory claim, thereby nullifying the longer limitation adopted by Congress for the statutory claim and depriving the plaintiff of "the full benefit of federal law." *Id.* at 325, 326. For those reasons, the Court applied the limitations period Congress had enacted for the statutory claim to the common law claim as well.

DelCostello v. Teamsters and *Lampf v. Gilbertson* are quite similar. Those cases involved federal causes of action that were *judicially implied* from a federal statute. In each of those cases, moreover, the statute which gave rise to the implied cause of action also stated express

causes of action with express limitations periods quite different from the state limitations periods that otherwise would have been borrowed. That being so, the Court soundly reasoned that the basis for applying the state law borrowing rule was attenuated at best, because the causes of action in question were ones Congress "really never knew existed." *Lampf*, 501 U.S. at 359. The Court reasoned, too, that the surest way to effectuate congressional intent where "the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation" is to "look first to the statute of origin." *Id.* The *Lampf* Court stated:

> We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections. *See DelCostello*, 462 U.S. at 171. When the statute of origin contains comparable express remedial provisions, the inquiry usually should be at an end. [501 U.S. at 359.] [6]

There is thus but a *single* case in which this Court has departed from the "usual rule" and has borrowed for a federal *statutory* claim a limitations period contained in *a different federal statute*.[7] That case, *Agency Holding*

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[6] *Holmberg v. Armbrecht*, *supra*, also involved an implied cause of action, but one for which the sole remedy was in equity. In that context the Court applied the doctrine of laches, rather than any statute of limitations, reasoning that Congress "can hardly expect" the courts "to break with historical principles of equity in the enforcement of federally-created equitable rights." 327 U.S. at 395.

In *West v. Conrail*, 481 U.S. 35 (1987), a statute of limitations contained in the National Labor Relations Act was applied to a cause of action implied under the Railway Labor Act, but the parties had agreed as to the applicable statute of limitations and the Court did not address the matter. *See id.* at 38 n.2.

[7] In *Occidental Life*, *supra*, the Court concluded that application of any statute of limitations, state or federal, to claims brought by the EEOC under Title VII of the Civil Rights Act of 1964 would be contrary to the policies underlying that statute, because the EEOC is statutorily required, before bringing suit,

Corp. v. Malley-Duff & Assocs., supra, involved a federal statute which, as the Court itself stated, 483 U.S. at 153, is *"sui generis:"* the Racketeer Influenced and Corrupt Organizations Act (RICO).

As the Court noted in *Agency Holding Corp.*, "the heart of any RICO complaint is the allegation of a pattern of racketeering." 483 U.S. at 154. The "predicate acts that may establish racketeering activity under RICO are far ranging"; those acts "cannot be reduced to a single generic characterization" and "will often occur in several states." *Id.* at 152, 154. The RICO cause of action, moreover, rests on "[c]oncepts such as RICO 'enterprise' and 'pattern of racketeering activity' [which] were simply unknown to common law." *Id.* at 150.

Rather, the RICO cause of action was based upon "an antitrust model." *Id.* at 151. The RICO civil enforcement provision was taken virtually verbatim from the civil enforcement provision of the Clayton Act, 15 U.S.C. § 15 (a), which, like RICO, provides for treble damages to a person "injured in his business or property." And the " 'clearest current' in the legislative history of RICO 'is the reliance on the Clayton Act model.' " 483 U.S. at 151, *quoting Sedima S.P.R.L. v. Imrex Co.,* 437 U.S. 479, 489 (1985). In these unique circumstances the Court determined that the Clayton Act statute of limitations should be applied to RICO claims.

Fairly read, then, *Agency Holding Corp.* confirms that, as the Court subsequently has put it, "the 'state borrowing doctrine' may not be lightly abandoned," *Lampf,* 501 U.S. at 356, and a "compelling demonstration" is required to justify a deviation from this doctrine, *Reed,* 488 U.S. at 327.

B.

Petitioners thus begin with a heavy burden in their attempt to push aside state law here and make this case

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to engage in an indeterminate period of investigation and conciliation.

the second in a set of one in which this Court has borrowed for an express federal statutory claim a limitations period contained in a different federal statute. That burden is doubly heavy given that the WARN Act—unlike RICO—creates nothing more than a simple damage action against employers who breach a single duty, *viz.*, the duty to give 60 days advance notice prior to a plant closing or mass layoff. On its face, this plain-vanilla remedial scheme is the least likely of candidates for ignoring state law.[8]

Petitioners advance two arguments in an effort to show that the application of state limitations statutes would "frustrate the policies embraced by the federal enactment." *Lampf*, 501 U.S. at 356. Neither argument withstands analysis.

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[8] Pennsylvania provides three specific limitations periods, ranging from two to four years, that appropriately could be applied to a WARN claim: the four-year limitation for actions on a contract either implied in law or based on an agreement not in writing, 42 Pa. Cons. Stat. Ann. § 5525(3) or (4); the three-year limitation for suits under the Pennsylvania Wage Payment and Collection Law to recoup "unpaid wages or liquidated damages," 42 Pa. Stat. Ann. § 260.9a(g); or the two-year limitation for enforcing civil penalties, 42 Pa. Cons. Stat. Ann. § 5524(5). Alternatively, Pennsylvania's six-year residual statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527, could be applied. *See Owens v. Okure*, 488 U.S. 235, 246-247 (1989) (in a § 1983 case, court could apply "a residual provision which applies to all actions not specifically provided for"). *But cf. Agency Holding Corp.*, 483 U.S. at 153.

All of those limitations periods apply to claims for money damages such as are presented in a WARN Act suit. To be sure, as petitioners argue at length, Pennsylvania does not have a plant-closing-notice law like WARN—although it is hardly unkown under state law for a party to be monetarily liable for acting without proper notice. "[T]he mere fact that state law fails to provide a perfect analogy to the federal cause of action is never itself sufficient to justify the use of a federal statute of limitations." *Agency Holding Corp.*, 483 U.S. at 147. *See also DelCostello*, 462 U.S. at 171. Indeed, "any analogies to [state] causes of action are bound to be imperfect," *Wilson v. Garcia*, 471 U.S. 261, 271 (1985), and "the adoption of one analogy rather than another will often be somewhat arbitrary," *id.* n.24.

1. Petitioners first contend that application of a state limitations period would frustrate a supposed federal policy favoring "rapid" or "speedy" resolution of "employment disputes." Crown Br. 27-28; North Star Br. 27-32. Significantly, petitioners point to nothing in the WARN Act itself stating such a policy. Indeed, the fact that the Act expressly forecloses any form of injunctive relief—including temporary restraining orders and preliminary injunctions—suggests that rapid resolution of legal disputes is *not* a priority under this law.[9]

Rather than finding some conflict between state statutes of limitations and the "policies embraced by the federal enactment" at issue—the WARN Act—petitioners rely on *other* federal enactments to establish this supposed federal policy governing "employment disputes" generally. Needless to say, petitioners are quite selective in the statutes they choose to cite. For example, petitioners completely bypass such federal employment laws as the Fair Labor Standards Act, the Davis-Bacon Act, the Equal Pay Act, the Walsh-Healy Act, the Employee Retirement Income

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[9] It is, of course, true, as petitioners note, that the point of the law is to assure employees of timely advance notice of closings and mass layoffs in order "to provide an immediate cushion of time for employees to explore new job opportunities and, if necessary, seek retraining." Crown Br. 25. But the statute of limitations issue arises only where employees sue for backpay because they have *not* received that "immediate cushion." Such a lawsuit cannot and does not seek a "cushion of time;" the suit seeks backpay, and petitioners point to nothing in the Act to suggest that it was Congress' judgment that, where an employer has failed to provide the required notice, backpay must be sought quickly or not at all.

To the contrary, the backpay provided under the WARN Act is "in effect a liquidated damages provision[], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings." S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987). *See also id.* at 2 (characterizing all WARN monetary payments as "penalties"); H.R. Rep. No. 285, 100th Cong., 1st Sess. 4 (1987) (same). Those statutory purposes would hardly be served by holding that an employer escapes liability whenever employees do not bring suit within six months.

Security Act (ERISA), the Federal Employers' Liability Act, the Employee Polygraph Protection Act, and the Family and Medical Leave Act. Notwithstanding petitioners' silence in these regards, it is surely significant that *all of these eight federal employment laws provide express limitations periods of from two to six years for civil actions.*[10] That, we submit, completely refutes petitioners' overbroad argument.

This is not to deny that there is a federal policy favoring the rapid resolution of *certain* types of employment—or, more precisely, labor—disputes. Specifically, § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides a six-months limitations period for claims arising under that Act. This Court has correctly understood that statute of limitations to embody a policy favoring speed with respect those disputes which

> implicate[] "those consensual processes that federal law is chiefly designed to promote—the formation of the [collective bargaining] agreement and the private settlement of disputes under it." [*DelCostello*, 462 U.S. at 171, *quoting United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 70-71 (1981) (Stewart, J., concurring in judgment), in turn *quoting Hoosier Corp.*, 383 U.S. at 702.]

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[10] *See* 29 U.S.C. § 255 (two year limitation for suits under Fair Labor Standards Act (including the Equal Pay Act), Davis-Bacon Act and Walsh-Healy Act); 29 U.S.C. § 1113 (six year limitation on certain ERISA actions); 45 U.S.C. § 56 (three year limitation on suits under Federal Employers' Liability Act); 29 U.S.C. § 2005(c)(2) (three year limitation on suits under Employee Polygraph Protection Act); 29 U.S.C. § 2617(c)(1)-(2) (two year limitation on suits under Family and Medical Leave Act).

In contrast, the anti-discrimination laws which are enforced through the Equal Employment Opportunity Commission require that *administrative charges* be filed within a relatively short time after those claims arise. 42 U.S.C. § 2000e-5(e). *See also* Crown Br. 28 n.13 (cataloging six-month limitation periods in state statutes, virtually all of which pertain to the filing of administrative charges of discrimination). Petitioners make no argument that the policy underlying that requirement is in any sense implicated by WARN Act lawsuits.

The implied cause of action at issue in *DelCostello*, through which the plaintiff sought to overturn a grievance-arbitration award, directly implicated those processes. For that reason—and because the cause of action was implied from the same law, the NLRA, which established the six-month limitations period for express claims, *see* pp. 10-11 *supra*—the Court applied § 10(b) in *DelCostello*.[11]

That *DelCostello* does not, as petitioners seem to believe, state a more general policy favoring the rapid resolution of all "employment disputes" is clear from this Court's subsequent decision in *Reed*. That case involved a claim under § 101(a)(2) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411(a)(2), in which a union member alleged that the union had violated his right to free speech concerning union matters. This Court, after acknowledging that such a case might have an impact on a "union's activities and effectiveness in the collective bargaining arena," 488 U.S. at 330-331, nonetheless upheld the applicability of a state statute of limitations rather than NLRA § 10(b). The *Reed* Court explained that result as follows:

> These observations . . . are not enough to persuade us that federal policy requires that § 10(b) govern claims under § 101(a)(2) of the LMRDA, for they establish no more than that § 101(a)(2) actions may sometimes have "some impact on economic relations between union and employer and on labor

[11] *DelCostello* involved a "hybrid suit" consisting of a claim that the union had breached its NLRA duty of fair representation in processing a grievance under a collective bargaining agreement, coupled with an "inextricably interdependent" claim against an employer, brought under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for breach of the collective agreement. 462 U.S. at 164-165, *quoting Mitchell*, 451 U.S. at 66-67 (Stewart, J., concurring in judgment). Had the plaintiff prevailed on the fair representation claim, the result would effectively have been to set aside the resolution of the grievance reached through the grievance procedure and to reopen the plaintiff's claim as to the meaning of the collectively-bargained agreement.

> peace." Brief for Respondents 22. *This is substantially less immediate and less significant an impact on bargaining and private dispute settlement than that which led us to apply the § 10(b) statute to hybrid § 301/fair representation claims, which directly challenge both the employer's adherence to the collective-bargaining agreement and the union's representation of the employee in grievance-and-arbitration procedures.* [488 U.S. at 331 (emphasis added).]

If, as the Court held in *Reed*, the relief sought in an LMRDA § 101(a)(2) case does not have a sufficiently direct impact on the negotiation and enforcement of a collective bargaining agreement to justify application of the six-month limitation contained in NLRA § 10(b), it is obvious that a WARN Act claim, in whch the only relief available is a sum of money, does not call for the application of § 10(b). Pursuit of that claim for money is unlikely to have *any* impact—let alone a direct impact —on the negotiation or enforcement of a collective bargaining agreement.[12]

2. Crown alternatively argues that state law should be discarded here because its application would create certain complications in WARN litigation. Specifically, Crown expresses the concern that, because a WARN suit may be brought in any district "in which the employer transacts business," 29 U.S.C. § 2104(a)(5), and because some employers transact business in several

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[12] Petitioners make the mistake of assuming that, because the *notice* required by WARN may have some impact on bargaining, a WARN *lawsuit* also must have such an impact. That assumption is triply flawed. In the first place, petitioners' argument has no application, even on its own terms, to unrepresented workers or to public agencies. In the second place, although, in a unionized workplace, a WARN notice may in some cases cause the union to request bargaining, the statute does not *require* bargaining, nor does it directly affect the bargaining process. *See infra* at 24-25 and n.16. Thirdly, even putting those points aside, a WARN *lawsuit* does not even result in a *notice*, much less in any other relief that might have an impact on bargaining.

jurisdictions, employees might engage in forum shopping if the applicable statute of limitations were to vary from state to state. Crown also argues that the availability of a number of possible limitations statutes will give rise to complex litigation. Crown Br. 30-32. *See also* North Star Br. 13-17. Those concerns are overstated and do not justify abandoning resort to state limitation statutes in WARN cases.

It is not at all unusual for a plaintiff to be able to bring a federal claim in any district in which the employer transacts business. Indeed, the general federal venue provision permits this in most cases where a statute does not provide otherwise. *See* 28 U.S.C. § 1391(b),(c). The settled rule requiring application of state statutes of limitation could never have become established if an exception were to be made whenever a defendant is subject to suit in several states.

Hoosier Corp., supra, is instructive in this regard. There the Court declined to adopt a uniform limitations period for claims under § 301 of the Labor Management Relations Act—which may be brought "in any district court of the United States having jurisdiction of the parties," 29 U.S.C. § 185(a)—despite the Court's recognition that "the subject matter of § 301 is 'peculiarly one that calls for uniform law.' " *Hoosier Corp.,* 383 U.S. at 701, *quoting Teamsters Local v. Lucas Flour Co.,* 369 U.S. 95, 103 (1962). The Court stated that, "although a uniform limitations provision for § 301 suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us." 383 U.S. at 702-703.

To be sure, in *Agency Holding Corp.,* the Court stated that, in litigation under RICO, "[w]ith the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would 'virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward

matter.' " 483 U.S. at 154. But the Court's analysis was directed at the unique features of RICO, under which so many different kinds of predicate acts committed in different jurisdictions may form the basis of liability that there necessarily would be a debate in every case as to the choice of law and the proper characterization of the particular claims asserted. *See supra* at 12.

That problem does not exist with respect to the WARN Act, which allows only one kind of claim and which most commonly involves a dispute wholly within one State. Thus, the potential for forum shopping and uncertainty was much greater in *Agency Holding Corp.* than here. Any such potential is easily dealt with here in the established way of so doing: the adoption of a uniform "generic characterization" of the single WARN Act cause of action with the result that claims thereunder are subject to a *single type* of *state* limitations statute. *See Reed,* 488 U.S. at 325; *Wilson v. Garcia,* 471 U.S. at 268; *Owens v. Okure, supra.*[13]

When all is said and done, the application of state statutes of limitations to WARN suits does not give rise to any greater potential for forum shopping or complexities of litigation than is the case with any other federal statute to which state limitations have been applied. Indeed, in at least two respects, WARN presents such problems to a much lesser degree than other statutes. First, as we have noted, WARN suits all involve only one simple kind of claim, rather than the multiplicity of claims that may be asserted under other statutes not containing an

[13] Similarly, if, as Crown maintains, there is confusion as to whether a federal court should apply the limitations period of the forum state or of the state where the violation occurred, *see* Crown Br. 30-31, that question (like the question whether to apply one type of state statute of limitations or more than one type) is a matter that the Court could resolve in a uniform way in an appropriate case presenting the question. The mere fact that such issues may need to be resolved is in no way peculiar to the WARN Act context.

express limitation period. Second, the backpay available to employees under WARN does not exceed sixty days of wages no matter when suit is brought; consequently, unlike the situation under most statutes, a WARN plaintiff cannot engage in forum shopping to find a statute of limitations that will enable hm to secure a greater potential backpay award. Indeed, as the instant case illustrates, most often WARN lawsuits will be filed within the time limits of any applicable state limitations period, thereby pretermitting the need to resolve any of the questions about which petitioners fret.

In sum, if state law can be discarded as the source of law for limiting this elementary cause of action, it can be discarded in any case.

C.

Recognizing the futility of their attempt to show that application of a state limitations periods here would be "inconsistent with" or "frustrate" federal policy, petitioners attempt to remake the governing rule more to their liking. Thus, Crown states that although "[o]n occasion" this Court has looked to state limitations periods as a " 'fallback rule of thumb,' " the Court "has often borrowed a limitations period for a federal cause of action from elsewhere in federal law" and, according to Crown, it is 'questionable how weighty the 'fallback' presumption of state law borrowing should be." Crown Br. at 8-9. Crown proceeds to answer that "question" as follows: "Courts should borrow a limitations period from the best analogy, *be it state or federal*, so long as the limitations period is consistent with federal policies and litigation practicalities." *Crown* Br. 10 (emphasis added). And both Crown and North Star devote the lion's share of their briefs to arguing that "the NLRA offers a closer analogy" or "closer fit" to the WARN Act than any state law alternative. North Star Br. 11-25; Crown Br. 18-27.

1. Petitioners' argument suffers from the same defect as the Ptolemaic theory. Just as the ancient astronomers started from the premise that the earth is the center of

the universe and the sun is at the periphery, so petitioners start from the premise that the "narrow exception" to the state law borrowing rule is the center of this Court's statute of limitations jurisprudence and that the "general rule" of state law borrowing is at the periphery. Indeed, at bottom, petitioners deny *any* preference for state limitations periods; in their view, the inquiry presumes that analogous state limitations periods and federal limitations periods are equal sources in the borrowing context.

This Court has never so held. Rather, what this Court has said—not just "occasionally" but repeatedly for over 160 years—is that there is a strong presumption favoring state law, to be overcome only on a "compelling demonstration." *See supra* at 7-12.

Petitioners base their contrary argument on the following words from *DelCostello, supra,* which are quoted in several subsequent decisions:

> [W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law. [462 U.S. at 171-72.]

By its own terms, this statement is far more limited than petitioners acknowledge since it requires not only a "*clearly* . . . closer analogy" but also a determination that "the federal policies at stake and the practicalities of litigation make [the federal] rule . . . *significantly* more appropriate." Moreover, *DelCostello* also explicitly states that "resort to state law remains the norm," to be overcome only where the state rules are *"at odds with the purposes or operation of federal substantive law." Id.* at 171, 161 (emphasis added). And, as we have seen, on its facts *DelCostello* involved an extraordinary situa-

tion in which the federal law which gave rise to the implied cause of action contained an express statute of limitations for express claims indistinguishable in all relevant respects from the implied claims.

That *DelCostello* did not announce a rule obliterating the state law preference in favor of a practice which looks equally to state and federal law for the "closest analogy" was made explicit by the Court's decision six years later in *Reed*. The *Reed* Court described *DelCostello* as "a closely circumscribed exception to the general rule that statutes of limitation are to be borrowed from state law," 488 U.S. at 324, and rejected arguments such as petitioners advance here on the ground that those arguments "fail[] to take seriously our admonition that analogous state statutes of limitations are to be used unless they frustrate or significantly interfere with federal policies," *id.* at 327.[14]

In sum, the relevant question here is not the degree of "fit" of state and federal analogies but rather whether

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[14] North Star suggests that the Court "may wish to revisit the wisdom of its current borrowing doctrine," and "[i]n its place . . . adopt a borrowing doctrine in which federal law is used almost exclusively to determine federal limitations periods." North Star Br. 32. In truth, only with such a drastic reinvention of the law could petitioners win this case. But, as we have shown, the state limitations borrowing rule is an established principle under which Congress expects its enactments to be enforced. *See supra* at 8. To change that rule after the enactment of the statute would be to depart from what must be presumed to have been the intent of the Congress that enacted WARN. It should be noted in this connection that in 1990, Congress adopted a new four-year residual statute of limitations for federal statutes that do not provide for a specific limitations period. *See* 28 U.S.C. § 1658, as amended by Pub. L. 101-650, Title III, § 314(a), 104 Stat. 5114 (Dec. 1, 1990). That provision will end state limitations borrowing, but *only* as to statutes "enacted *after* the date of the enactment of this section." *Id.* (emphasis added). The Court should decline petitioners' invitation to change the law as to statutes, such as WARN, that were enacted *prior* to that date. *Cf. Patsy v. Florida Board of Regents*, 457 U.S. 496, 512 (1982).

application of state limitations statutes would frustrate federal policies. As we already have seen, application of a state limitations period here would do nothing of the kind.

2. Even if, contrary to what we have just shown, petitioners were correct in focusing on the "closest analogy," petitioners still would be wrong on the result in this case. For NLRA § 10(b) does not, in fact, fit the circumstances of the WARN Act.

The most petitioners can fairly say is that WARN explicitly requires notice to unions, unrepresented workers, and local government officials in advance of certain closings and layoffs, while the duty to bargain in good faith under the NLRA has been construed (quite correctly) to give rise to an obligation to provide notice to a union—although certainly not to unrepresented employees or to public agencies—in some such situations. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-682 (1981).

Any resemblance between the WARN Act and the NLRA ends at that superficial level.

a) WARN and the NLRA are, respectively, exemplars of what this Court has recognized to be two *fundamentally distinct* categories of labor legislation. One category, of which the NLRA is the prime example, concerns itself "with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck. . . ." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753 (1985). The other category consists of laws that do not regulate the bargaining process itself, but instead set "minimum terms of employment," *id.* at 754, *i.e.*, "minimum substantive requirements" designed to "give specific minimum protections to individual workers, *id.* at 754-755. The Court has explained that enactments of the latter type—which create "rights, and obligations independent of a labor contract," *Allis Chalmers*

v. Lueck, 471 U.S. 203, 212 (1985)—simply do not occupy the same field as the NLRA. *Metropolitan Life*, 471 U.S. at 751-758.

WARN is decidedly in this second category of labor legislation. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the Court held that a state law requiring employers to provide a severance payment to employees in the event of a plant closing establishes a "minimum substantive labor standard" which does not "directly regulate[]" the process of collective bargaining or the use of economic weapons, *id.* at 20, and therefore does not fall within the field covered by the NLRA. The same is true of the WARN Act.

The WARN statute does *not* establish or regulate any duty in an employer to bargain or consult with anyone—unions, unrepresented employees, or local governments. Indeed, as Crown acknowledges, the initial formulation of the WARN legislation contained a consultation requirement, but the provision was deleted from the bill before enactment.[15]

WARN simply establishes one minimum substantive standard: an employer who has decided to conduct a closing or a mass layoff cannot keep his intentions in the dark but must provide 60 days notice to employees,

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[15] A provision that would have required employers to disclose certain information also was deleted. *See* House Committee on Education and Labor, Subcomm. on Labor-Management Relations, 101st Cong., 2d Sess., Legislative History of the Worker Adjustment and Retraining Notification Act (Comm. Print 1990) at 683 (statement of Senator Metzenbaum) (as a result of eliminating the consultation and information provisions, "[t]he bill now is a simple and straightforward notice law"). *See also id.* at 286 (statement of Senator Metzenbaum) ("[N]o one associated with this bill ever intended it to affect the balance of rights under the National Labor Relations Act. This bill is absolutely neutral with respect to labor law."). Inexplicably, Crown purports to discover the meaning of the WARN Act by citing statements in the legislative history describing the proposed legislation as it existed *before those critical deletions*. *See* Crown Br. 16-18 and n.10.

unions and public agencies. As with the severance pay required by the statute in *Fort Halifax Packing Co.*, the purpose of the notice required by WARN is to soften the blow of such employment losses; the notice is intended to enable affected employees to arrange their finances and begin their search for other employment, and to enable local governments to provide timely job counseling and training services. *See* S. Rep. No. 62, 100th Cong., 1st Sess. 5, 9-12 (1987); 20 C.F.R. § 639.1(a).

Thus, WARN falls squarely within the class of labor legislation that deals with substantive standards, rather than the class that deals with the process of collective bargaining that is the subject of the NLRA.[16]

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[16] To describe the NLRA as "designed to afford protection against job loss," North Star Br. 23, quoting *United Mine Workers v. Peabody Coal Co.*, 38 F.3d 850, 856 (6th Cir. 1994), is to misconceive the statute in the most fundamental respect. "[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved." *First National Maintenance*, 452 U.S. at 680-681.

Although, as a practical matter, the providing of notice under WARN may in some cases lead to the initiation of bargaining (although only where a workplace is organized), it remains the case that WARN does not itself require or regulate bargaining. Any surface similarity between WARN and the NLRA in this one regard has no bearing on the choice of a limitations period. As the Court said in *Reed* of the relationship between Title I of the LMRDA and the NLRA, any "overlap" between the two statutes "would not be attributable to similar federal policies underlying each of these areas of protection, for the policies . . . are quite different." 488 U.S. at 333 n.7.

The NLRB has recognized the sharp distinction between WARN and the NLRA in holding that payments required by WARN may not be credited against payments required to remedy a violation of NLRA § 8(a)(5). In reaching that result the Board explained that "WARN payments remedy the [employer's] violation of its obligations to give advance notice of its decision to cease operations. The [NLRA] payments remedy the [employer's] violation of its obligations to allow for meaningful bargaining . . . ." *Times Herald Printing Co.*, No. 16-CA-15433, 1994 NLRB LEXIS 972, at *12 (NLRB Nov. 30, 1994).

b) WARN also differs dramatically from the NLRA in the remedies that are available under the two statutes.[17]

As discussed, a WARN suit cannot eventuate in any relief other than the payment of money. Under the NLRA, in contrast, to remedy an employer's failure to bargain in good faith over a decision (or the effects of a decision) as to which the Act requires bargaining, the NLRB will issue an order requiring the employer to bargain,[18] and the NLRB may order other relief of an injunctive nature including, in appropriate cases, an order to reopen an operation pending the required bargaining.[19] Even the backpay that may be awarded under the NLRA is measured very differently from the damages available under WARN.[20]

Thus, even if, on proper analysis, the choice of a limitations period for WARN Act claims turned simply on identifying "the best analogy" in state or federal law, Crown Br. 10, there still would be no basis for applying NLRA § 10(b) here.[21]

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[17] The focus of the Court's analysis in *DelCostello* was on the nature of the relief—setting aside an arbitration award—that was available in both hybrid suits and unfair labor practice proceedings. *See supra* at 15-16. So too, in *Agency Holding Corp.*, the Court focused on the similarity between the enforcement schemes of RICO and the Clayton Act, including the fact that both statutes provide for treble damages. *See* 483 U.S. at 150-152.

[18] *See, e.g., Stevens Pontiac-GMC*, 295 NLRB 599, 603 (1989).

[19] *See, e.g., Power Inc. v. NLRB*, 40 F.3d 409, 425 (D.C. Cir. 1994) (requiring employer to resume subcontracted operations in order to ensure meaningful bargaining).

[20] *Compare Transmarine Navigation Corp.*, 170 NLRB 389 (1968), with 29 U.S.C. § 2104(a)(1), (2).

[21] Petitioners make much of the fact that WARN contains three express references to the NLRA. *See* Crown Br. 16; North Star Br. 20. This does not advance petitioners' cause. Two of those references are intended *to ensure that WARN has no impact on NLRA rights and processes. See* 29 U.S.C. § 2103(2) (notice not required to economic strikers as defined under the NLRA); 29

II. IF IT WERE PROPER TO SELECT A FEDERAL STATUTE OF LIMITATIONS FOR WARN ACT CLAIMS, THE TWO-YEAR PERIOD STATED IN THE PORTAL-TO-PORTAL ACT WOULD BE MORE APPROPRIATE THAN THE SIX-MONTH PERIOD OF NLRA § 10(b)

As we have shown, this Court's decisions require that state limitations statutes be applied in WARN suits. But if that were not the case, and the Court were free to adopt a limitations period from another federal statute, the most appropriate place to look would not be to the NLRA's statute of limitations but rather to the express limitations periods stated in federal laws that establish substantive terms of employment.

There is, to repeat, a fundamental distinction between the NLRA on the one hand, and laws establishing minimum employment standards on the other. WARN falls squarely within the latter category. Pp. 23-25, *supra*. And, when Congress has created rights to sue in court to enforce other federal employment standards, Congress invariably has concluded that in enforcing substantive employment laws more than six months is needed to retain a lawyer, investigate, determine whether to sue, and then prepare and file a complaint. *Cf. Burnett v. Grattan*, 462 U.S. 42 (1984).

U.S.C. § 2108 (giving notice under WARN shall not constitute a violation of the NLRA). The third reference simply incorporates the NLRA definition of an exclusive "representative." 29 U.S.C. § 2101(a)(4). Nor is there any significance in the fact that the Labor Department and the courts have looked to NLRA precedent with respect to certain concepts that come into play under WARN, such as the distinction between employees and independent contractors, or between single and joint employers. *See* Crown Br. 18-19; North Star Br. 20-21. The same could be said of virtually all labor statutes—including the LMRDA, as to which the *Reed* Court rejected the application of NLRA § 10(b). *See, e.g., Machinists Lodge 702 v. Loudermilk*, 444 F.2d 719, 722 (5th Cir. 1971).

Given the substantive nature of the WARN Act, the most analogous federal statute of limitations is that contained in the Portal-to-Portal Act for actions "to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, *or liquidated damages*" under the Fair Labor Standards Act and kindred wage acts. As we have seen, the WARN Act creates a liability which Congress understood to be in the nature of "liquidated damages." *See* note 9 *supra*. That liability, like FLSA liquidated damages, is measured by an employee's "regular rate," 29 U.S.C. § 2104(a)(1)(A), a term of art under the FLSA. *See* 29 U.S.C. § 207.

Perhaps most telling, the WARN Act and the Portal-to-Portal Act both provide, in virtually identical words, that a court may "in its discretion" reduce the amount of liquidated damages upon proof that the employer acted "in good faith and . . . had reasonable grounds for believing that the act or omission was not a violation" of the law. 29 U.S.C. § 260 (Portal-to-Portal Act); 29 U.S.C. § 2104(a)(4) (WARN Act). And the legislative history confirms what is apparent on its face, that this provision of the WARN Act was modeled upon, and intended to be interpreted in conformity with, the Portal-to-Portal Act.[22]

Thus, if Congress intended to depart from the usual rule of borrowing state limitations periods as the source for limiting WARN actions, it is far more likely that Congress would have favored application of the Portal-to-Portal Act's two-year limitations period—which is in the mainstream of federal statutes of limitations for actions to enforce employment standards, *see* pp. 14-15, *supra*—than that Congress would have called for application of the NLRA's six-month statute of limitations, which was enacted to address claims that, unlike WARN Act suits, implicate the NLRA's "consensual processes,"

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[22] *See* S. Rep. 62, *supra*, at 24-25.

p. 15, *supra*.[23] Because this action was filed within two years after the cause of action accrued, it thus would be timely even if federal law were the appropriate source of the statute of limitations.

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[23] Indeed, application of a six-month statute of limitations to WARN Act claims would be peculiarly inappropriate given the number of relatively complex issues a potential plaintiff must consider in determining whether a violation has occurred. For example, if a plant continues in operation after a mass layoff, potential plaintiffs must assess the number and percentage of employees laid off over *any* thirty or ninety day period. 29 U.S.C. §§ 2101(a)(3), 2102(d). What is more, those numbers are affected by the number of employees who were offered transfers to other employment sites, *if* the offers comported with certain terms specified in the Act. 29 U.S.C. § 2101(b)(2). There are, as well, special provisions for situations where a layoff originally was announced as less than six months but ultimately extended beyond six months; the statutory test in that case turns on what was "reasonably foreseeable." 29 U.S.C. § 2102(c). Finally, the Act includes defenses that turn on two difficult determinations: (i) whether, "as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business," and (ii) whether "the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. § 2102(b)(1), (2)(A). *See also* § 2102(b)(2)(B) (exception for natural disasters); § 2103 (other exemptions).

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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